although the news is sold to the public in the shape of newspapers or donated to the public by writing on bulletin boards—a condition where an express restriction would not only be ineffective but absurd—the equity court is not reaching too far when it implies and enforces a restriction that the news shall not be used in such a way as to defeat the commercial value which it has to the complainant or to deprive him of the reward because of which alone the business and public service of news gathering is made profitable. In fact we fail to find a single case where an equity court in dealing with a commercial commodity—a result or record of expense and labor—has held that a use which was necessary to make the commercial value of the commodity available was at the same time such an act or "publication" as destroyed the property right, the value of which was just beginning to be realized.[17] If such is the result of the decisions, the court in enjoining the third practice set forth in the bill applies to a new set of facts, and in the most just and beneficial manner, a rule which is supported by an abundance of authority.

LIABILITY OF A CHARITABLE INSTITUTION FOR TORTS.—The general rule that an employer is liable not only for his own wrongful acts, but also for those of his servants committed in the course of their employment, is subject to an exception in favor of charitable institutions.[1]

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poreal rights in property created by him or at his expense, and capable of a taking by another, where such taking either diminishes or destroys the enjoyment of those rights by the owner and divests a part of the enjoyment of profits from the rights to the one complained of."

[17]Exchange Tel. Co. *v.* Central News, Ltd., *supra*; Exchange Tel. Co. *v.* Gregory & Co., *supra*; McDearmott Co. *v.* Board of Trade (C. C. A. 1906) 146 Fed. 964; Kiernan *v.* Manhattan Quotation Tel. Co., *supra*; Palmer *v.* DeWitt (1872) 47 N. Y. 532; Board of Trade *v.* Christie Co., *supra*; National Tel. News Co. *v.* Western Union Tel. Co., *supra*; Board of Trade *v.* Tucker, *supra*; Board of Trade *v.* Hadden-Krull Co., *supra*.

It is believed that this rule harmonizes all the cases where a complainant has appealed to equity for the protection of an incorporeal property right, not protected by law. The court sometimes grants relief on the basis of unfair competition as in Montegut *v.* Hickson (1917) 178 App. Div. 94, 164 N. Y. Supp. 858, (see criticism in 17 Columbia Law Rev. 730). Whether the decision is to be supported on the ground taken by the court or not, it is submitted that it may be supported as a protection of a property right, published only to the extent made necessary by the nature of the business. Such a class of cases as is represented by Stein *v.* Morris (Va. 1917) 91 S. E. 177, where relief is denied, may be distinguished on the basis that there is no commercial embodiment of the idea, corresponding to the dress model in the Montegut case, *supra*, and to the news in the principal case.

[1]A charitable institution is one devoted to the benefit of the public and from which those who conduct its activities receive no pecuniary benefit. So an institution maintained to provide, at reasonable cost, a home for working girls, Thornton *v.* Franklin Square House (1909) 200 Mass. 465, 86 N. E. 909, or a free hospital, is a charity and the latter does not lose its character because some of its patients pay regular fees. Duncan *v.* Nebraska Sanitarium & Benevolent Ass'n. (1912) 92 Neb. 162, 137 N. W. 1120; Powers *v.* Massachusetts Homœopathic Hospital (C. C. A. 1901) 109 Fed. 394; Adams *v.* University Hospital (1907) 122 Mo. App. 675, 99 S. W. 453. But a Y. M. C. A., Chapin *v.* Holyoke Y. M. C. A. (1896) 165 Mass. 280, 42 N. E. 453, or an employees' mutual benefit society is not a charity. Coe *v.* Washington Mills (1889) 149 Mass. 543, 21 N. E. 966; but *cf.* Fire Ins. Patrol *v.* Boyd (1888) 120 Pa. 624, 15 Atl. 553.

The conflicting theories[2] which have been advanced to support this exception have led to a chaos of decisions which make difficult the determination of the extent of the immunity. In the recent case of *Goodman* v. *Brooklyn Hebrew Orphan Asylum* (App. Div. 2nd Dept. 1917) 165 N. Y. Supp. 949, the court pointed out that such immunity did not extend to protect the defendant from liability for injuries caused by servants whom it had selected without exercising due care.[3]

In considering this exemption it seems more profitable to inquire into the reasons for the rule in each class of acts than to analyze the various bases which have been proposed for the exception. The torts for which an eleemosynary institution might be sued may be divided into the following classes: (a) those arising out of its ownership of property and those committed by its servants (b) against a stranger and (c) against a beneficiary of the charity.[4] Some courts, adopting the theory that the funds of the charity are trust funds and hence should not be depleted because of any wrongful act of the trustees or those acting under them, have refused, logically but very unreasonably, to make any distinction between the various kinds of torts and have granted absolute immunity from such liability.[5] But this is not the general rule, and even in jurisdictions committed to the trust fund theory, this conclusion has not been accepted.[6]

Where fees are charged with the expectation of gain for the proprietors, Green *v.* Biggs (1914) 167 N. C. 417, 83 S. E. 553; Richardson *v.* Dumas (1914) 106 Miss. 664, 64 So. 459, the institution is not a charity, even if the charter of the organization contemplates charitable work. See Brown *v.* La Societe Francaise (1903) 138 Cal. 475, 71 Pac. 516.

[2]For a discussion of the ground which have been given for the exception see 1 Columbia Law Rev. 485, 7 Columbia Law Rev. 353.

[3]An appeal was taken on exception to a dismissal by a lower court because the plaintiff's attorney, although he had alleged that the defendant was negligent in hiring its servants, did not mention this fact in his opening to the jury. The court held that the omission was immaterial and that a good cause of action was alleged. The case was remanded for trial.

[4]A charity is not liable for the acts of a doctor. He is not under its immediate control but acts in a position similar to an independent contractor. He is not a servant, nor are the nurses working under his immediate supervision. Schloendorff *v.* New York Hospital (1914) 211 N. Y. 125, 105 N. E. 92.

[5]In such jurisdictions it has been held that an institution was not liable for maintaining its building in a negligent condition, Abston *v.* Waldon Academy (1907) 125 Tenn. 24, 102 S. W. 35, for the negilgence of its servants, Fire Ins. Patrol *v.* Boyd, *supra,* nor for employing servants known to be negligent. Williamson *v.* Louisville Industrial School (1894) 95 Ky. 251, 24 S. W. 1065.

[6]Liability has been imposed for the negligent injury to a mechanic working on the premises, Bruce *v.* Central Methodist Episcopal Church (1907) 147 Mich. 230, 110 N. W. 951, although the court expressly affirmed Downes *v.* The Harper Hospital (1894) 101 Mich. 555, 60 N. W. 42 which was decided on the theory that the funds of the charity should not be defeated because of the torts of the trustees of the fund. In McDonald *v.* Massachusetts General Hospital (1876) 120 Mass. 432, the trust fund theory was adopted, but in Davis *v.* Central Congregational Society (1880) 129 Mass. 367, recovery was allowed for a negligent injury. In its opinion at p. 372, the court said: "It makes no difference that no pecuniary profit or other benefit was received or expected by the society. * * * this defendant as an incorporated religious society and as an owner and occupier of the premises in question, is subject to all the duties and liabilities which are incident to the ownership and possession of real estate."

It would seem clear that a charity which owns a building leased for business purposes should be subject to the same duties as any other property owner.[7] And where the property is used for the purposes of the organization, strangers invited upon the premises are entitled to the same protection as is required from any individual.[8] The reasons would seem even stronger for protecting the rights of a stranger injured by the wrongful act of the servants of the institution.[9] A person who does not voluntarily subject himself to the actions of the charities finds scant comfort in the realization that his injury was caused by the servant of the charitable institution and that he is, for that reason, without relief. To excuse a charity for such torts is a false policy, which encourages negligence and deprives the community of protection from wrongful acts.

The situation with regard to a beneficiary is quite different. He voluntarily enlists the aid of the institution and subjects himself to its care. There are reasons of policy which warrant the rule that a charity is not liable to him for the acts of its carefully selected servants.[10] The doctrine of *respondeat superior* is itself founded on policy.[11] It is deemed a just and a wise rule that one who receives the benefits of his servants' acts should be responsible for them. In this case, however, the patient and not the charity receives the benefit of the servant's act, and in return for kindness he should not be allowed to hold the institution for a tort which it used reasonable care to

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[7]*Cf.* Stewart *v.* Harvard College (1866) 94 Mass. 58.

[8]Davis *v.* Central Congregational Church, *supra*; Hospital of St. Vincent of Paul *v.* Thompson (1914) 116 Va. 101, 81 S. E. 13. Where a mechanic was injured because of the improper condition of a cellar in which he was hired to work, Hordern *v.* Salvation Army (1910) 199 N. Y. 233, 92 N. E. 626; *contra,* Wittacker *v.* St. Luke's Hospital (1909) 137 Mo. App. 116, 117 S. W. 1189, and where a nurse was set to work and not warned that the patient suffered from a contagious disease, Hewett *v.* Woman's Hospital Aid Ass'n. (1906) 73 N. H. 556, 64 Atl. 190, or where an inmate was falsely imprisoned, Gallon *v.* House of Good Shepherd (1909) 158 Mich. 361, 122 N. W. 631, the institution was held liable.

[9]Liability is incurred through the negligence in a servant's driving the defendant's wagon, Basabo *v.* Salvation Army Inc. (1912) 35 R. I. 22, 85 Atl. 120, or ambulance. Van Ingen *v.* Jewish Hospital of Brooklyn (1917) 99 Misc. 657, 164 N. Y. Supp. 832; Kellogg *v.* Church Charity Foundation (1908) 128 App. Div. 214, 112 N. Y. Supp. 566, reversed on a question of fact 1911) 203 N. Y. 191, 96 N. E. 406. *Contra,* Noble *v.* Hahnemann Hospital (1906) 112 App. Div. 663, 98 N. Y. Supp. 605. Even if the institution be considered engaged in governmental activities because of its public service, it does not escape liability because municipal agencies acting independently retain their duty to the public. O'Connell *v.* Merchants' & Police Dist. Tel. Co. (1915) 167 Ky. 468, 180 S. W. 845. But if the hospital is operated by the government it incurs no liability for the negligence of its servants. Smith *v.* State of New York (1915) 169 App. Div. 438, 154 N. Y. Supp. 1003.

[10]McDonald *v.* Massachusetts General Hospital, *supra.* In Power *v.* Massachusetts Homœopathic Hospital, *supra,* the court denied plaintiff recovery on the ground that by accepting charity he had waived his right to recover for negligent treatment.

[11]Mechem Agency (1st. ed.), § 734.

prevent.[12] In exempting the institution from liability, the law does not work a hardship, while it does encourage and assist the valuable work conducted under charitable auspices. But there is grave danger in excusing the exercise of care in the selection of employees, for negligence in that respect puts the beneficiary in a hazardous position and thereby destroys the value of the institution to the public. Consequently, it has been held that failure to act carefully in selecting the facilities and the persons through which the charity was to be administered rendered the institution liable for the injuries resulting therefrom.[13]

The reasons for excusing charitable institutions for torts apply only to the acts of servants to beneficiaries and immunity should not be extended farther. It is important to public safety that charities in other cases should not be relieved of the duty of exercising due care. It would be much less confusing and nearer to the sound rule if the court would considered the immunity of charitable institutions as the exception and not the general rule.

PAYMENT BY CHECK—ITS EFFECT UPON THE ORIGINAL OBLIGATION.—In the recent case of *Bates* v. *Dwinell* (Neb. 1917) 174 N. W. 722, the defendant contracted orally to sell cattle to the plaintiff for $5,000 and the plaintiff gave him a check for that amount. Later the defendant became dissatisfied and returned the check to the plaintiff without having presented it for payment. The plaintiff at the time the check was given had only $1500 in the drawee bank, but the cashier testified that he would have paid the check if presented. In an action for damages for the non-delivery of the cattle it was held that the check did not constitute "payment" in the absence of agreement between the parties, and therefore the contract was within the Statute of Frauds.

Where the parties agree that a check shall be accepted as payment, it is well settled that their intention shall control.[1] But in the absence of such an agreement certain presumptions are held to govern in the

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[12]"This limitation [of liability to failure to hire competent servants] is founded upon public policy, upon which the very doctrine of *respondeat superior* itself may be said to be founded. * * * Much may be said against the soundness of this principle, and whether it would not be wiser to hold even public charitable institutions to a higher degree of care. But in this country it has been settled that for the promotion of works of humanity and for the greater good for the greater number that that is a sound public policy." Cohen, J. in Ward *v.* St. Vincent Hospital (1898) 23 Misc. 91, 50 N. Y. Supp. 463; overruled on another ground (1899) 39 App. Div. 674, 57 N. Y. Supp. 784.

[13]Hoke *v.* Glenn (1914) 167 N. C. 594, 83 S. E. 807; St. Paul's Sanitarium *v.* Williamson (Tex. Civ. App. 1914) 164 S. W. 36; see Illinois Central Ry. *v.* Buchanan (1907) 126 Ky. 288, 103 S. W. 372.

[1]Mutual Life Ins. Co. *v.* Chattanooga Savings Bank (Okla 1915) 150 Pac. 190. Norton, Bills and Notes (4th ed.) 25.

Where there is an unliquidated claim or a *bona fide* dispute with regard to the amount owned, the parties may effect an accord and satisfaction by agreeing to extinguish the obligation by the acceptance of a check, even if it is for a smaller amount. See Decker *v.* Smith & Co. (1916) 88 N. J. L. 630, 96 Atl. 915; Canadian Fish Co. *v.* McShane (1908) 80 Neb. 551, 114 N. W. 594. But if the claim is liquidated, such an agreement will not constitute an accord and satisfaction. Eckert *v.* Wallace (1907) 75 N. J. L. 171, 67 Atl. 76.